IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DOUGLAS ALLEN MCCONNELL, Appellant.	)	2 CA-CR 2007-0004 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20041542

Honorable Kenneth Lee, Judge

AFFIRMED

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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Douglas McConnell was convicted of one count of disorderly conduct. The trial court suspended the imposition of sentence and placed

McConnell on intensive probation for one year. On appeal, McConnell argues that the evidence was insufficient to support the conviction and that the court fundamentally erred by improperly instructing the jury on burden of proof. Finding no error, we affirm.

Background

¶2 We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the conviction. *See State v. Manzanedo*, 210 Ariz. 292, ¶ 3, 110 P.3d 1026, 1027 (App. 2005). McConnell drove into the parking lot of a motel, eventually stopping near several people who had congregated outside. Apparently mistaking one of those people, Pete H., for a man named Mark, McConnell pointed a gun out the passenger window toward Pete and said either, "[T]his one's for you, Mark" or "[T]his is for you, Mark." Pete said he was not Mark, and McConnell drove away without firing the gun.

¶3 The state charged McConnell with two counts of aggravated assault with a deadly weapon, one for assaulting Pete and the other for assaulting Larry F., another person in the group. Before trial, the court dismissed with prejudice the count regarding Larry. The jury found McConnell not guilty of the remaining aggravated assault count but guilty of the lesser-included offense of disorderly conduct.

Sufficiency of the Evidence

¶4 McConnell contends the evidence was insufficient to support the conviction because it did not establish that Pete was the intended victim. "When reviewing whether sufficient evidence supports a criminal conviction, we determine if '*any* rational trier of fact

could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Johnson*, 210 Ariz. 438, ¶ 5, 111 P.3d 1038, 1040 (App. 2005), *quoting Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). "'To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury.'" *Id., quoting State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). "[W]e view the evidence in the light most favorable to sustaining the verdict," *id.*, "draw[ing] all reasonable inferences that support the verdict." *State v. Fulminante*, 193 Ariz. 485, ¶ 27, 975 P.2d 75, 84 (1999).

¶5 To convict McConnell of disorderly conduct, the state had to prove that he had intended to disturb Pete's peace or had knowingly done so and had recklessly handled or displayed the gun. *See* A.R.S. § 13-2904(A)(6); *State v. Burdick*, 211 Ariz. 583, ¶ 8, 125 P.3d 1039, 1041 (App. 2005). Although witnesses' accounts of what happened differed, Pete testified that McConnell pointed the gun at him while saying either, "[T]his one's for you, Mark" or "[T]his is for you, Mark." This evidence was sufficient to prove that McConnell intended to disturb Pete's peace or at least knowingly did so. *See Manzanedo*, 210 Ariz. 292, ¶ 3, 110 P.3d at 1027 (testimony of one eyewitness substantial evidence where testimony conflicted). And McConnell does not dispute that the evidence was sufficient to show that he recklessly handled the gun.

¶6 McConnell contends Pete's story was implausible because the car McConnell was driving was small and the passenger, Mark O., was a large man. Although there was

testimony regarding Mark O.'s large size and the car's small size, it did not prove as a matter of law that it would have been impossible to point the gun out the window at Pete. And Pete steadfastly testified that McConnell had pointed the gun at him.

¶7 McConnell also contends Pete lacked credibility, based on inconsistency between his testimony and the testimony of other witnesses, an incident when he laughed while testifying, and his three prior felony convictions. But McConnell had the opportunity to, and did, cross-examine Pete about his testimony, including his laughing during his testimony, and his prior convictions. Pete's credibility was an issue for the jury to decide. *See State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996). Although McConnell and Mark O. testified differently on the stand and another witness testified that he could not recall whether McConnell had pointed the gun at Pete, "[t]he jury was entitled to believe whichever witnesses it found credible." *Manzanedo*, 210 Ariz. 292, ¶ 3, 110 P.3d at 1027. Pete's testimony supplied sufficient evidence to support the conviction.

¶8 McConnell also contends that, if any disorderly conduct occurred, the actual victim was someone other than Pete. But testimony that McConnell had disturbed another person's peace does not detract from the substantial evidence that McConnell had disturbed Pete's peace as well. And the fact that McConnell may have mistaken Pete for someone else is irrelevant to the analysis. We conclude there was sufficient evidence to support the conviction.

Burden of Proof Instruction

¶9 McConnell next argues the trial court erred in failing to instruct the jury that the burden to prove each element of the offense remains with the state and never shifts to the defendant. Because, as McConnell concedes, he neither requested such an instruction nor objected on this ground to the instructions given, we review solely for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *see also State v. Johnson*, 173 Ariz. 274, 276, 842 P.2d 1287, 1289 (1992) (claim that trial court failed to reinstruct on reasonable doubt at close of evidence waivable).

¶10 Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20. "[W]hen the claim of error goes to jury instructions, we examine the instructions 'in their entirety in determining whether they adequately reflect the law.'" *State v. Sierra-Cervantes*, 201 Ariz. 459, ¶ 16, 37 P.3d 432, 435 (App. 2001), *quoting State v. Rutledge*, 197 Ariz. 389, ¶ 15, 4 P.3d 444, 448 (App. 2000). We read the instructions as reasonable jurors would, and we "will not reverse a conviction 'unless we can reasonably find that the instructions, when

taken as a whole, would mislead the jurors.'" *Id., quoting State v. Strayhand*, 184 Ariz. 571, 587, 911 P.2d 577, 593 (App. 1995).

¶11 Here, the court gave the reasonable doubt instruction mandated by *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995). That instruction and another of the final instructions both included the requirement that the state bears the burden of proving each element of the offense beyond a reasonable doubt.

¶12 McConnell does not contend these instructions were improper. Instead, he argues that, in light of the court's later instruction that the defendant bears the burden of proving self-defense by a preponderance of the evidence,[1] the court should have instructed the jury that the state's burden to prove the elements of the offense never shifts during trial. But the self-defense instructions stated that McConnell's burden applied to the claim of self-defense, and the two prior instructions informed the jury that the state had to prove each element of the offense beyond a reasonable doubt.

¶13 Read as a whole, the jury instructions did not misstate the law and were not misleading. *See Sierra-Cervantes*, 201 Ariz. 459, ¶ 16, 37 P.3d at 435. Reasonable jurors would have understood that the state bore the burden of proving each element of the offense beyond a reasonable doubt, but that the defendant bore the burden of proving self-defense by a preponderance of the evidence. *See id.* Therefore, McConnell fails to show error. *See*

[1]When McConnell committed this offense, A.R.S. § 13-205 required defendants to prove justification defenses by a preponderance of the evidence. 1997 Ariz. Sess. Laws, ch. 136, § 4; *see also* A.R.S. § 13-404 (self-defense a justification defense).

Henderson, 210 Ariz. 561, ¶ 23, 115 P.3d at 608 (to show fundamental error, defendant must first show error).

Conclusion

¶14 For the foregoing reasons, we affirm McConnell's conviction and placement on probation.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge